

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JULIAN BURRELL)	
Claimant)	
VS.)	
)	Docket No. 154,980
NORTH AMERICAN SALT COMPANY)	
Respondent)	
AND)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Kansas Workers Compensation Fund appeals from an Award entered by Administrative Law Judge George R. Robertson on June 30, 1994.

APPEARANCES

Respondent and insurance carrier appeared by and through their attorney, Mickey W. Mosier of Salina, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Jeffrey E. King of Salina, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has adopted the stipulations listed in the Award.

ISSUES

The issues between respondent and claimant were settled by agreement reflected in a settlement hearing of September 30, 1991. Respondent reserved its claims against the Kansas Workers Compensation Fund. The two (2) issues presented on appeal were:

- (1) Nature and extent of claimant's disability, if any; and,
- (2) Liability of the Kansas Workers Compensation Fund, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds:

The Appeals Board finds that the Kansas Workers Compensation Fund is liable for all of an award based upon a nine percent (9%) permanent partial general disability.

At the time of the settlement hearing, the parties left for later resolution all issues between respondent and the Kansas Workers Compensation Fund. The Kansas Workers Compensation Fund did not stipulate to the reasonableness of the settlement. Accordingly, the nature and extent of claimant's disability and the amount of benefits due remain for determination in this appeal.

Two physicians, Dr. C. Reiff Brown and Dr. Jeryl G. Fullen, testified regarding the nature and extent of claimant's disability. After reviewing the record, the Appeals Board finds more convincing the opinions expressed by Dr. Brown who rated claimant's permanent partial impairment at nine percent (9%) of the body as a whole. Dr. Fullen initially expressed his opinion that claimant had a fifteen percent (15%) general body disability. After receipt of FCA results, Dr. Fullen changed his opinion and concluded that claimant had no permanent impairment. From review of the record as a whole, including the claimant's own testimony, the Appeals Board concludes claimant has sustained permanent impairment which is accurately assessed by Dr. Brown as a nine percent (9%) disability to the body as a whole.

K.S.A. 1990 Supp. 44-567 provides that the Kansas Workers Compensation Fund is to be liable for all of the benefits awarded in cases where the employer retained the employee with knowledge of a pre-existing impairment and the employee then suffered an injury which would not have occurred but for that pre-existing impairment. The record in this case clearly establishes that claimant was a handicapped employee which respondent retained with knowledge of claimant's pre-existing impairment. Claimant began his employment for respondent in July of 1980. Respondent filed a Form 88, Notice of Handicap, on February 22, 1988, reflecting claimant's impairment to his low back. Filing of that Form 88 creates the presumption that respondent had knowledge of claimant's pre-existing impairment. K.S.A. 1990 Supp. 44-567(b). Respondent's training and safety supervisor, Jim Brewster, testified and introduced records relating to several injuries to

claimant's low back in the course of his employment for respondent. Included among the records were medical reports also describing claimant's low back condition as a degenerative condition at the L3-4 and L5 levels.

The Appeals Board also finds that the injury at issue in this case would not have occurred but for claimant's pre-existing impairment. The conclusion is based upon Dr. Brown's opinion to that effect. This conclusion is also based upon evidence that the injury was at the same level and involved only minor trauma.

For the above and foregoing reasons, the Appeals Board finds that the Kansas Workers Compensation Fund should be liable for all of the Award based upon a nine percent (9%) permanent partial impairment. The settlement reached between claimant and respondent resulted in payments to the claimant by respondent which would equate to benefits greater than nine percent (9%) permanent partial impairment. The Kansas Workers Compensation Fund shall be responsible for reimbursement of the temporary total disability, the medical benefits, and permanent partial disability benefits based upon a nine percent (9%) permanent partial functional impairment.

AWARD

WHEREFORE, an award of compensation is hereby entered in favor of respondent and against the Kansas Workers Compensation Fund.

The Kansas Workers Compensation Fund is to reimburse respondent for 22 weeks of temporary total disability at the rate of \$278.00 per week in the total amount of \$6,116.00 and 393 weeks of permanent partial disability at the rate of \$33.48 per week in the total amount of \$13,157.64 for a total award of \$19,273.64.

The Kansas Workers Compensation Fund is also ordered to reimburse respondent for all medical expenses paid by respondent so reflected in the settlement.

Fees necessary to defray the expense of administration of the Workers Compensation Act are hereby assessed against the respondent and the Kansas Workers Compensation Fund is to reimburse 100% of the following:

OWENS, BRAKE & ASSOCIATES	
Settlement Hearing Transcript	\$ 35.00
Dated September 30, 1991	
Deposition of Dr. Jeryl Fullen	\$231.20
Dated February 17, 1993	
Deposition of Jim Brewster	\$233.75
Dated December 9, 1993	
Total	\$499.95

UNDERWOOD AND SHANE

Deposition of Dr. C. Reiff Brown

Dated October 19, 1993

\$179.40

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mickey W. Mosier, Salina, KS
Jeffrey E. King, Salina, KS
George R. Robertson, Administrative Law Judge
Philip S. Harness, Director